

December 14, 2010

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: WC Docket No. 07-52
GN Docket No. 09-191

Dear Ms. Dortch:

On December 14, 2010, I spoke with Peter Karanjia, Deputy General Counsel with regard to the above captioned proceeding.

We discussed use of Section 628(b) of the Act as a basis for authority with regard to prohibition on discrimination based on content and with regard to the right to attach any non-harmful device to the network. As an initial matter, PK does not believe that there is any legal reason to exclude MVPDs using broadband as a distribution platform from the definition of MVPD. No basis in the statute exists for such a distinction based on the plain language of the statute. Accordingly, to the extent vertically integrated broadband providers would seek to thwart delivery of competing video content, it would violate Section 628(b) in the same manner that exclusive contracts for access to inside wiring and exclusive contracts for the delivery of broadband service are subject to Commission jurisdiction pursuant to Section 628(b).¹

Even without reaching the question of whether MVPDs exclusively using broadband as distribution platform are protected by Section 628, there is ample evidence that traditional MVPDs rely on broadband as a distribution platform, and that some subscribers chose to subscribe to one MVPD for broadband access and another for video service. Such MVPDs and their subscribers be negatively impacted if rival MVPDs could discriminate in provision of their broadband access service based.²

Finally, PK noted that the press reported today that Comcast planned to release an “Internet enabled” integrated set-top box/cable modem which would allow Comcast to control what websites and content a subscriber accessed for display on the television screen.³ According to

¹ See *National Cable Telecommunications Association v. FCC*, 567 F.3d 659 (D.C. Cir. 2008).

² For example, when News Corp blocked access to its programming to Cablevision subscribers as part of its retransmission dispute, it impacted not only Cablevision video subscribers, but also broadband subscribers using an alternate MVPD. See Letter of Public Knowledge, filed October 21, 2010. While that situation would not have violated the proposed rules, it is easy enough to see from this example how a vertically integrated MVPD, could block access to programming provided online by rival MVPDs or degrade the online experience for those subscribing to a competing MVPD for video.

³ “Comcast Tests Combo Internet-Cable Device,” Wall Street Journal (December 13, 2010) available at: http://online.wsj.com/article/SB10001424052748704091204576017921595179398.html?mod=ITP_marketplace_0

press reports, Comcast hopes the device, called “XCalibur,” will “slay” competitors such as Google TV.⁴ This clearly demonstrates the need for both a non-discrimination rule and a network attachment rule, related to the FCC’s responsibility to prevent unfair competition under Section 628(b).

In accordance with Section 1.1206(b), this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/Harold Feld
Legal Director

cc:
Peter Karanjia

⁴“Comcast Hopes To Slay Google TV with Xcalibur,” PCWorld (December 13, 2010) available at: http://www.pcworld.com/article/213549/comcast_hopes_to_slay_google_tv_with_xcalibur.html